(3)

No.

IN THE

Supreme Court of the United States

HITACHI HIGH TECHNOLOGIES AMERICA, INC.,
PETITIONER,

v.

UNITED STATES AND
MICRON TECHNOLOGY, INC.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Federal Circuit ("Federal Circuit") err in holding that 19 U.S.C. § 1675(a)(2)(C) does not require the United States Department of Commerce ("Commerce") to use the antidumping duty determination it makes in an annual review of a producer as the basis for the assessment of antidumping duties on entries of goods made by that producer?

PARTIES TO THIS PROCEEDING

The parties to this proceeding are the same as those in the Federal Circuit: Petitioner Hitachi High Technologies America, Inc. ("HTA") and Respondents United States and Micron Technology, Inc.

All parent corporations and any publicly held companies that own 10% or more of HTA's stock are: Hitachi High-Technologies Corporation and Hitachi America, Ltd.

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No. _____

In the Supreme Court of the United States

HITACHI HIGH TECHNOLOGIES AMERICA, INC.,
Petitioner,

v.

UNITED STATES AND
MICRON TECHNOLOGY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

HTA respectfully petitions for a writ of certiorari to review the judgment of the Federal Circuit.

OPINIONS BELOW

The decision of the Federal Circuit is unpublished but is reported as *Nissei Sangyo America, Ltd. v. United States*, No. 04-1469, -1492, 2005 U.S. App. LEXIS 13,277 (Fed. Cir. July 1, 2005), *reh'g denied*,

2005 U.S. App. LEXIS 24,124 (Fed. Cir. 2005)[1] and is reprinted in the Appendix ("App.") at 1a.[2]

The decision of the United States Court of International Trade, which was reversed by the Federal Circuit, is unpublished but is reported as *Nissei Sangyo America, Inc. v. United States*, Slip Op. 03-105 (Ct. Int'l Trade Aug. 18, 2003), and is reprinted at App. 7a.

The decision of the Federal Circuit was based in pertinent part on its earlier decisions in *Consolidated Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003), *reh'g denied*, 2003 U.S. App. LEXIS 26,770 (Fed. Cir. 2003) ("*Consolidated Bearings I*"), reprinted at App. 24a, and *Consolidated Bearings Co. v. United States*, 412 F.3d 1266 (Fed. Cir. 2005) ("*Consolidated Bearings II*"), reprinted at App. 46a.

JURISDICTION

The Federal Circuit entered its judgment and opinion on July 1, 2005, and denied HTA's motion for rehearing and petition for rehearing en banc on October 18, 2005. The deadline to file a petition for writ of certiorari is January 17, 2006. This Court has

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[1] HTA is the successor by merger to Nissei Sangyo America, Ltd.

[2] *Renesas Technology America, Inc. v. United States*, No. 04-1473, -1474, 2005 U.S. App. LEXIS 13,278 (Fed. Cir. July 1, 2005), *reh'g denied*, 2005 U.S. App. LEXIS 26,770 (Fed. Cir. 2005), a companion case to this case at the Federal Circuit involves substantially the same issues as this case. HTA understands that Renesas is also petitioning this Court for a writ of certiorari.

jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

Section 1675(a)(2)(C) of Title 19, U.S. Code, provides:

> The determination under this paragraph shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties.

STATEMENT

With imports into the United States comprising more than 10% of the U.S. gross domestic product (*www.cia.gov/cia/publications/factbook/geos/us.html*), federal import laws are of substantial importance to U.S. business. One of the most important federal laws affecting merchandise imported into the United States, and the law under which this case arises, is the U.S. antidumping law. 19 U.S.C. §§ 1673 - 1675b. U.S. antidumping law protects U.S. industries from foreign companies that are selling products in the U.S. market at prices that are less than those charged in their home or third country markets, when such pricing practices materially injure, or threaten material injury to, U.S. industry. 19 U.S.C. § 1673.

Under the U.S. antidumping law, importers of merchandise subject to antidumping duties pay estimated antidumping duties at the time the merchandise enters the United States. 19 U.S.C. §

1673b(d). The final decision as to how much antidumping duties are owed, if any, typically is not made until years after importation when an import entry is "liquidated."[3] 19 U.S.C. § 1673e. As a result, the United States uses a "retrospective" scheme for assessing antidumping duties. *See* 19 C.F.R. § 351.212(a) ("Unlike the systems of some other countries, the United States uses a 'retrospective' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported.").

The rate used to pay the estimated antidumping duties at the time of importation, which is known as the "cash deposit" rate, is calculated by Commerce. Per the statute at issue in this case (19 U.S.C. § 1675(a)(2)(C)), the cash deposit rate is the most recent rate Commerce calculates for the goods' producer.

Since the cash deposit rate is only an estimate, and because importers and U.S. industry often disagree over whether the estimated rate is too high or too low, Commerce, if requested to do so, annually determines the actual antidumping duty rate that should be charged on merchandise imported during the time period Commerce reviews (usually a 12 month period known as a "period of review" or "POR"). 19 U.S.C. § 1675. Upon conclusion of the review, and assuming that none of the parties to the review seeks judicial review of Commerce's determinations, Commerce orders the U.S. Customs Service (now known as U.S. Customs and Border Protection, or "CBP") to liquidate the

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[3] "Liquidation means the final computation or ascertainment of the duties (not including vessel repair duties) or drawback accruing on an entry." 19 C.F.R. § 159.1.

suspended entries and to assess antidumping duties based on the rate determined in the review. 19 U.S.C. § 1675(a). Companies that request their own antidumping duty review often receive their own unique/separate rate from that of the producer. If litigation ensues, liquidation of the entries is usually enjoined pending the outcome of the litigation and the entries are eventually liquidated in accordance with the court decision. 19 U.S.C. §§ 1516a, 1675(a)(3)(C).

Additionally, the antidumping duty rate calculated during the review becomes the new cash deposit rate for entries of goods manufactured by each producer at issue in the review that are imported subsequent to the review. The new deposit rate applies regardless of whether the goods are exported by the producer or by a third-party, such as a reseller of merchandise manufactured by that producer.

In 1993, following issuance of an antidumping duty order on certain dynamic random access memory semiconductors ("DRAMs") from Korea, Commerce instructed CBP to require importers of DRAMs originating in Korea and manufactured by LG Semicon Co., Ltd. ("LG") to pay estimated antidumping duties, *i.e.*, a cash deposit, equal to 4.97%, the antidumping duty rate calculated by Commerce for LG in the original investigation. *Antidumping Duty Order and Amended Final Determination: Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea*, 58 Fed. Reg. 27,520 (May 10, 1993). Starting in July 1993, HTA entered into the United States numerous shipments of Korean DRAMs manufactured by LG and, based on instructions issued by Commerce, paid estimated

antidumping duties based on the 4.97% cash deposit rate calculated for LG.

In May 1994, and again in May 1995, Micron Technology, Inc. ("Micron"), the petitioner in the original antidumping administrative proceedings, requested that Commerce conduct an administrative review of "the subject merchandise manufactured and/or sold by" LG during the first and second annual review periods. Federal Circuit Joint Appendix ("JA") 66; JA 95-100. In June 1994, and again in June 1995, Commerce complied with Micron's request and initiated administrative reviews of imports of DRAMs manufactured by LG and other Korean producers identified by Micron. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 59 Fed. Reg. 30,770 (June 15, 1994); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 60 Fed. Reg. 31,447 (June 15, 1995). Entries of all DRAMs manufactured by LG, including HTA's entries, thus were covered by Commerce's review for each of the first two reviews of the DRAMs antidumping order.

At the outset of the first review, Commerce advised that entries of all subject merchandise produced by the reviewed producers would be treated according to the results of the reviews for the producers. JA71 ("[Entries suspended from liquidation] will be liquidated at the rates established in this administrative review for the three Korean manufacturers."). It also advised that those resellers who requested their own rates would have their entries liquidated in accordance with the separate calculations made for those resellers. *Id.* ("However, the Japanese

resellers for whom administrative reviews have been requested may receive individual rates depending upon their status under the intermediary country provision."). Ultimately, Commerce calculated weighted-average dumping margins for LG in the first and second reviews of 0.00% and 0.01%, respectively. *DRAMs of One Megabit or Above from Korea*, 61 Fed. Reg. 20,216 (May 6, 1996); *DRAMs of One Megabit or Above from Korea*, 62 Fed. Reg. 965 (Jan. 7, 1997). Since HTA had not requested its own rate, HTA thus expected that its entries of LG DRAMs would be liquidated at these rates, not at the 4.97% estimated cash deposit rate.

Micron appealed to the Court of International Trade the results of both the first and second reviews with respect to LG but did not appeal Commerce's calculation with respect to the other subject Korean producer of DRAMs, Hyundai. *Micron Technology v. United States*, 44 F. Supp. 2d 216 (CIT 1999); *Micron Technology v. United States*, 40 F. Supp. 2d 481 (CIT 1999), *aff'd in part, rev'd in part*, 243 F. 3d 1301 (Fed. Cir. 2001). Thus, starting in 1997, Commerce issued instructions to CBP to liquidate all Hyundai-made DRAMs. JA123-24, 127-40. In each of these instructions, Commerce ordered CBP to liquidate all entries of DRAMs manufactured by Hyundai and imported during each POR at the weighted-average rate Commerce calculated for Hyundai in the reviews, not the cash deposit rate. Liquidation of all entries of LG-made DRAMs (including HTA's entries), in contrast, remained suspended pursuant to court injunction.

In May 1996, Micron again requested that Commerce conduct a review of merchandise manufactured and/or sold by LG during POR 3. In July 1997, Commerce published the final results of the third review of the DRAMs antidumping order. *DRAMs of One Megabit or Above from Korea*, 62 Fed. Reg. 39,809 (July 24, 1997). Because no party sought judicial review of the antidumping duty assessment rate for LG calculated for POR 3, in September 1997 Commerce again issued liquidation instructions. JA125-26. These instructions ordered CBP to liquidate all entries of DRAMs produced by LG at the rate Commerce calculated for LG in the third review, *i.e.*, zero. Importantly, HTA's imports of DRAMs during POR 3 were identical to those imported during PORs 1 and 2, inasmuch as HTA continued to purchase its DRAMs through a reseller (its parent corporation). Yet, Commerce instructed CBP and CBP liquidated all of the DRAMs manufactured by LG and imported by HTA during the third review period at the LG review rate, rather than the previously estimated cash deposit rate.

Approximately one year later, in October 1998, Commerce published a proposal to change its policy concerning the assessment of antidumping duties on merchandise imported from resellers. *Notice and Request for Comment on Policy Concerning Assessment of Antidumping Duties*, 63 Fed. Reg. 55,361 (Oct. 15, 1998) ("1998 Notice). Commerce proposed that if a producer did not know its merchandise was destined for the United States and the reseller did not have its own antidumping duty rate, then Commerce would not liquidate entries using the producer's rate, but instead would use the "all others"

rate. This rate represents the weighted average of the rates of **all** investigated producers as determined in the original investigation, not the rate of the producer who made the good. Commerce's 1998 proposal was not finalized until 2003. *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 Fed. Reg. 23,954 (May 6, 2003).

On November 1, 1999, after the Court of International Trade sustained Commerce's final review results for LG in both the first and second reviews, Commerce issued liquidation instructions to CBP with respect to LG DRAMs. JA145-48. Commerce directed CBP to liquidate the entries of certain importers of LG products (but not HTA) at confidential importer-specific rates. Rather than issuing liquidation instructions requiring CBP to assess antidumping duties using the rates Commerce calculated in the review for LG, as it had done in virtually all prior cases, *see, e.g., ABC Int'l Traders Co. v. United States*, 19 CIT 787 (1995), including the liquidation of HTA's entries in POR 3, Commerce directed CBP to liquidate all other importers' entries (including those of HTA) at the 4.97% cash deposit rate.

In issuing the 1999 instructions, Commerce abandoned its established policy of following 19 U.S.C. § 1675(a)(2)(C). It also acted in a manner inconsistent with the 1998 Notice by using the "cash deposit" rate rather than the "all others" rate. While the 1998 Notice indicated it would apply to the results of reviews initiated starting after publication of a final notice (63 Fed. Reg. 55,362), the 1998 Notice, by its own terms, was merely a "clarification" of how Commerce orders assessment of antidumping duties.

Because these instructions represented (1) a marked departure from Commerce's past practice, (2) a deviation from the 1998 Notice, (3) an inconsistent treatment of HTA's imports in PORs 1 and 2 vs. POR 3, and (4) a violation of 19 U.S.C. § 1675(a)(2)(C), HTA appealed Commerce's action to the Court of International Trade. HTA argued that Commerce's liquidation instructions to CBP violated 19 U.S.C. § 1675(a)(2)(C) and the Administrative Procedures Act (5 U.S.C. § 706). The Court of International Trade granted summary judgment in favor of HTA on August 18, 2003. App. At 7a. The court found that the challenged instructions were contrary to law because HTA "had no reason to know that Commerce would change" its "past practice" of liquidating at the rate established for the manufacturer of the merchandise. App. at 19a.

Commerce appealed the lower court decision to the Federal Circuit. During the pendency of that appeal, the Federal Circuit decided *Consolidated Bearings I*. In that case, Consolidated, another importer, argued, as did HTA in its case, that 19 U.S.C. § 1675(a)(2)(C) requires Commerce to base liquidation instructions for an importer on the calculated review rate of the producer. App. at 33a. The Federal Circuit rejected this argument, finding that while Section 1675(a)(2)(C) "requires Commerce to apply the final results of an administrative review to all entries covered by the review," imports purchased from a reseller--rather than directly from the manufacturer--are "not within the scope of the final results." App. at 39a-40a. Citing the statutory language, the Court added that "'entries' must be 'covered by the determination' to gain

entitlement to the review's results as the 'basis for the assessment' of duties." App. at 39a.

After remand proceedings concerning Consolidated's argument that Commerce had arbitrarily and capriciously departed from its prior practice, the Federal Circuit in *Consolidated Bearings II* upheld Commerce's liquidation of Consolidated's entries at the estimated cash deposit rate. App. at 46a. In HTA's appeal, which concerned a similar argument of departure from a prior practice, the Federal Circuit summarily dismissed HTA's Section 1675(a)(2)(C) argument by reference to its earlier decision in *Consolidated Bearings I*. App. 6a (" ... *Consolidated Bearings I* directs that the appellee does not have a statutory right to liquidation at the manufacturer's review rate"). It then proceeded to determine, based on its finding in *Consolidated Bearings II*, that Commerce had a consistent past practice of ordering CBP to liquidate entries of merchandise imported from resellers at the "cash deposit" rate. App. 6a.

REASONS FOR GRANTING THE PETITION

I. Interpretation of the Antidumping Duty Laws Is an Important Federal Issue

In light of the significance of antidumping duties to U.S. businesses, such as HTA, involved in international trade, business owners must carefully take these duties into account when planning to import needed products. To be able to plan, business needs to be able to rely on government officials interpreting the law in a

predictable way that accords with the plain meaning of a statute and Congressional intent.

Although specialized federal courts exist to provide business with judicial relief, if this Court does not fix the error committed by the Federal Circuit, no other avenue will be available to the many U.S. businesses that are adversely affected by Commerce's failure to follow the plain meaning of Section 1675(a)(2)(C) and Commerce's failure to act with consistency and predictability. This issue will not percolate among the circuits, and there will be no circuit conflict, because the Federal Circuit, as the exclusive forum for appeals in antidumping cases, has the last word on the matter—subject only to this Court's intervention.

To date, this Court has not had the occasion to interpret Section 1675, likely due to the fact that prior to 1999, Commerce had acted in accordance with Section 1675(a)(2)(C). Commerce's actions here – assessing a 4.97% rate in two of the three PORs when its own reviews showed that 0% was the proper amount – are reminiscent of an act of piracy worthy of the Barbary States, not the United States. Because imports are a growing and significant portion of the national economy, just as interstate commerce was at the turn of the 20th century, the Court should use this case to address the interpretation of how antidumping duties are assessed on U.S. importers.

II. The Federal Circuit's Decision Was Erroneous

Section 1675(a)(2)(C) provides that Commerce's determination in the annual review "shall be the basis for the assessment of countervailing or antidumping

duties on entries of merchandise covered by the determination." Commerce's decision to deny importers the benefit of the review rate calculated for the producer of the goods they purchase stands in direct contravention to the mandate of this important federal statute. The Federal Circuit wrongly decided that Commerce was free to ignore the statutory imperative if the producer of subject merchandise did not also happen to be the exporter of that merchandise.

To understand the phrase "entries of merchandise covered by the determination," it is necessary to consider that Commerce conducts administrative reviews of two types of foreign parties: (i) producers; and (ii) exporters. Both the statute and Commerce's regulations make clear that a requesting party may ask Commerce to conduct a review of "specified individual exporters or producers covered by an order." 19 C.F.R. § 351.213(b)(1); *see also* 19 U.S.C. § 1673b(d)(1)(A). In other words, when the agency conducts a review of a foreign party, it may review that party: (1) in its capacity as an exporter (in which case all entries exported by that party are covered by the determination in the review; (2) in its capacity as a producer (in which case all entries produced by that party are covered by the determination in the review); or, (3) in both of these capacities (in which case all entries either produced or exported by that party are covered by the determination in the review).

Thus, under the plain meaning of the statute, when Commerce conducts a review of a foreign party in its capacity as a producer, all entries of subject merchandise produced by that company are "covered by the determination" in the annual review such that

the determination "shall be the basis for the assessment of" antidumping duties on entries of the merchandise pursuant to 19 U.S.C. § 1675(a)(2)(C). In the vast majority of cases, Commerce does review foreign parties in their capacities as producers, either exclusively or in addition to reviewing them in their capacity as exporters. In this case, for example, petitioner Micron requested that Commerce conduct an administrative review of "the subject merchandise manufactured and/or sold by" LG. That is, Micron requested a review of LG in both its capacity as a producer and its capacity as an exporter. Therefore, all imported subject merchandise *produced* by LG, including merchandise purchased by HTA from a reseller, was covered by Commerce's determination in the review and should have been assessed antidumping duties based on the review results.

III. The Federal Circuit's Decision Will Cause Substantial Harm to U.S. Importers

For years, Commerce directed CBP to assess duties on all entries during the period of review based on the results of the review for each producer. Specifically, it applied rates calculated in annual reviews to all entries of merchandise produced by individual producers, regardless of whether the producer was also the exporter. Such an approach was proper and, as noted above, was mandated by 19 U.S.C. § 1675(a)(2)(C), which provides that the determination in the annual review "shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination."

In its "clarification" of policy, Commerce stated that it would only apply a new practice of using the "all others" rate, instead of the rate calculated in the review, prospectively. 1998 Notice, 63 Fed. Reg. at 55,362. Not only did Commerce abandon the terms of the law and its previous policy of ordering liquidation at the manufacturer's rate, which it did not do when it ordered liquidation of HTA's entries during POR 3, but Commerce inexplicably did not even implement its newly proposed policy of liquidating reseller entries at the "all others" rate.

The Federal Circuit ruled that this change in practice did not depart from prior practice, and this ruling alone probably does not rise to a level justifying review by this Court, but Commerce's new and markedly different interpretation of Section 1675(a)(2)(C) is an entirely different matter. It imposes potentially great costs on U.S. businesses. The "all others" rate is usually significantly higher than the rates calculated for individual manufacturers in annual reviews. The "all others" rate, moreover, never changes, even when the high investigation rates upon which it was based are superseded. Thus, the Federal Circuit's decision upholding Commerce's erroneous interpretation of Section 1675(a)(2)(C) dooms U.S. companies to pay excessive duties on every importation into the United States of subject goods purchased from resellers.

In addition, in failing to follow the plain meaning of Section 1675(a)(2)(C), the Federal Circuit has put U.S. importing businesses in a "catch 22" situation. After the Federal Circuit's decision, an importer can buy imported goods from only the producer, but then it will

have to pay higher prices because it will not be able to seek competitive suppliers. Alternatively, an importer can buy goods from resellers, but then it will have to pay higher prices because it will have to pay dumping duties at an outdated, artificially high rate. Neither of these scenarios could be what Congress intended when it established an antidumping system in which annual reviews are conducted and declared that the results of these annual reviews "shall be the basis for the assessment of ... antidumping duties on entries of merchandise covered by the determination ...." 19 U.S.C. § 1675(a)(2)(C).

Thus, like many U.S. companies, HTA ran afoul of the antidumping laws through no fault of its own. Because HTA knew that Commerce's policy--in accordance with the requirements of 19 U.S.C. § 1675(a)(2)(C)--was to liquidate imports purchased from unreviewed resellers at the producer's review rate, it reasonably chose not to request a review of its supplier but rather to rely on liquidation at the LG rate. And indeed, if liquidation had proceeded in a timely manner, HTA's expectations would have been fulfilled, as POR 3 shows. Unfortunately, court litigation delayed liquidation, and by the time the litigation concluded, Commerce's interpretation of Section 1675(a)(2)(C) had changed, leading to the injustice and nonsensical result of HTA paying antidumping duties on goods that Commerce determined were not being dumped.

CONCLUSION

For the reasons provided above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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(any footnotes trail end of each document)

04-1469, -1492

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NISSEI SANGYO AMERICA, LTD. (now Hitachi High Technologies America, Inc.),
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant, and
MICRON TECHNOLOGY, INC.,
Defendant-Appellant.

July 1, 2005, Decided

NOTICE: THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NONPRECEDENTIAL OPINIONS OR ORDERS.

JUDGES: Before NEWMAN, MAYER, and CLEVENGER, Circuit Judges.

OPINION BY: CLEVENGER

OPINION: CLEVENGER, Circuit Judge.

The government appeals the final decision of the United States Court of International Trade granting summary judgment to Nissei Sangyo America, Ltd. (" the appellee") by finding that the instructions to liquidate appellee's entries at the cash deposit rate were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Nissei Sangyo Am., Ltd. v. United States*, 2003 Ct. Intl. Trade LEXIS 103, SLIP OP. 2003-105, No. 00-00113 (Ct. Int'l Trade Aug. 18, 2003) (" Nissei Sangyo"). The Court of International Trade held that the Department of Commerce (" Commerce") had deviated from its past practice of liquidating entries at the manufacturer's review rate when it ordered liquidation of appellee's entries at the cash deposit rate. Because the arguments in favor of the appellee are foreclosed by the decisions in *Consolidated Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003)(" Consolidated Bearings I"), and *Consolidated Bearings Co. v. United States*, 412 F.3d 1266, 2005 U.S. App. LEXIS 11803, No. 04-1556 (Fed. Cir. June 21, 2005) (" Consolidated Bearings II"), which collectively held that an unreviewed reseller is not statutorily entitled to the manufacturer's review rate and that Commerce in the past consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate, we reverse the decision of the Court of International Trade.

I

The appellee is an importer of Dynamic Random Access Memory semiconductors of one megabit or more (" DRAMs"). The appellee purchased its merchandise for import from a reseller not associated with the manufacturer of the DRAMs. The manufacturer of the

DRAMs imported by the appellee was LG Semicon Co., Ltd. (" LG"), formerly Goldstar Electron Co., Ltd., which was under review in antidumping proceedings. An antidumping duty order was in effect when the appellee imported the subject DRAMs. See Antidumping Duty Order and Amended Final Determination: Dynamic Random Access Memory Semiconductors of One Megabit and Above from the *Republic of Korea*, 58 Fed. Reg. 27,520 (May 10, 1993). Upon entry, the appellee was required to post cash deposits at the manufacturer's rate as estimated antidumping duties.

Administrative review of DRAMs made by multiple manufacturers that were imported into the United States from October 29, 1992 to April 30, 1994 (" POR 1") was initiated. Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 59 Fed. Reg. 30,770 (June 15, 1994). In this review, the dumping margin for LG was calculated to be 0.00%. Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 20,216, 20,222 (May 6, 1996). The appellee did not participate in this administrative review.

Beginning on June 15, 1995, a second period of review (" POR 2") from May 1, 1994 to April 30, 1995, was initiated. Initiation of Antidumping and Countervailing Duty Administrative Reviews, 60 Fed. Reg. 31,447 (June 15, 1995). For this period, the dumping margin for LG was determined to be de minimis at 0.01%. Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final

Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 965, 968 (Jan. 7, 1997). The appellee also did not participate in this review.

Micron Technology, Inc. (" Micron"), a domestic producer of DRAMs, sued in opposition to the rates determined for LG in POR 1 and POR 2. The Court of International Trade and this court sustained the rates determined for LG. *See Micron Tech., Inc. v. United States*, 243 F.3d 1301 (Fed. Cir. 2001); *Micron Tech., Inc. v. United States*, 23 Ct. Int'l Trade 380, 44 F. Supp. 2d 216 (Ct. Int'l Trade 1999); *Micron Tech., Inc. v. United States*, 23 C.I.T. 208, 40 F. Supp. 2d 481 (Ct. Int'l Trade 1999). Commerce subsequently issued liquidation instructions which lifted suspension of the POR 1 and POR 2 entries and directed Customs to liquidate appellee's entries at the cash deposit rate. Appellee's entries were not given the benefit of the de minimis dumping rate determined for LG in the administrative review.

The appellee appealed to the Court of International Trade, which found that the liquidation instructions issued by Commerce were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and entered summary judgment in favor of the appellee. When it issued its opinion, the Court of International Trade did not have the benefit of this court's decision in either Consolidated Bearings I or Consolidated Bearings II.

The government appeals the decision of the Court of International Trade arguing that Commerce had a consistent past practice of liquidating unreviewed

resellers at the cash deposit rate. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5) (2000).

II

A decision of the Court of International Trade reviewing an antidumping decision by Commerce is reviewed "anew" by this court by reapplying the same standard of review applied by the Court of International Trade when it reviewed the decision by Commerce. *Consolidated Bearings I*, 348 F.3d at 1004; *Mitsubishi Heavy Indus., Ltd. v United States*, 275 F.3d 1056, 1060 (Fed. Cir. 2001). Therefore, Commerce's liquidation instructions should be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See 5 U.S.C. § 706(2)(A) (2000); *Consolidated Bearings I*, 348 F.3d at 1004.

III

This case presents the same issue as Consolidated Bearings II, which issued from this court on June 21, 2005. In the present case, the Court of International Trade found that the liquidation instructions for appellee's entries were an arbitrary deviation from past practice because the instructions suffered the same problems as those in *Consolidated Bearings Co. v. United States*, 166 F. Supp. 2d 580, 25 Ct. Int'l Trade 546 (Ct. Int'l Trade 2001). *See Nissei Sangyo*, 2003 Ct. Intl. Trade LEXIS 103 at *15. We have since reversed *Consolidated Bearings*, 166 F. Supp. 2d 580, in Consolidated Bearings I, and to the extent that the Court of International Trade decision in this case relies on its opinion in that case, those arguments are no

longer sound. Because a "reseller" rate determination was never requested by these importers or their suppliers, Consolidated Bearings I directs that the appellee does not have a statutory right to liquidation at the manufacturer's review rate. *See* 348 F.3d at 1006.

What remains is whether Commerce deviated arbitrarily from a past consistent practice when it liquidated appellee's unreviewed entries at the cash deposit rate. This court has recently addressed this issue and held that Commerce "has consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate." *Consolidated Bearings II*, 2005 U.S. App. LEXIS 11803 at *16. Consolidated Bearings II directly applies to the facts of appellee's case. In particular, we note that the evidence relied upon by both Consolidated Bearings and Commerce to support their positions in the Consolidated Bearings II appeal is substantially the same as that offered by the respective parties in the present case. Therefore, for the reasons set forth in Consolidated Bearings II, the decision of the Court of International Trade is reversed.

Court No. 00-00113

UNITED STATES COURT OF INTERNATIONAL TRADE

NISSEI SANGYO AMERICA, LTD., Plaintiff,

v.

UNITED STATES,
Defendant, and MICRON

TECHNOLOGY, INC.,
Defendant-Intervenor.

August 18, 2003, Dated

COUNSEL: Katten Muchin Zavis Rosenman (Michael E. Roll) for plaintiff Nissei Sangyo America, Ltd.

Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, Patricia McCarthy Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; Patrick V. Gallagher, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for defendant United States.

Hale & Dorr, LLP (Michael D. Esch) for defendant-intervenor Micron Technology, Inc.

JUDGES: BEFORE: RICHARD W. GOLDBERG, SENIOR JUDGE.

OPINION BY: RICHARD W. GOLDBERG

OPINION: GOLDBERG, Senior Judge: Nissei Sangyo America, Ltd. ("NSA"), moves for summary judgment upon the agency record pursuant to *USCIT R. 56.1*, contesting the issuance of liquidation instructions contained in message numbers 9305211 and 9305212 ("Liquidation Instructions") by the U.S. Department of Commerce ("Commerce") to the U.S. Customs Service[1] ("Customs"), dated November 1, 1999. The Liquidation Instructions ordered the liquidation of NSA's entries of Dynamic Random Access Memory semiconductors of one megabit or above ("DRAMs") at the manufacturer's cash deposit rate rather than the rates determined for the manufacturer during the administrative reviews of May 6, 1996 and January 7, 1997.

For the reasons that follow, the Court holds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Court has jurisdiction over this matter pursuant to *28 U.S.C. § 1581(i)*.

I. BACKGROUND

NSA is an importer of Korean DRAMs manufactured by LG Semicon Co., Ltd. ("LG Semicon"), formerly Goldstar Electron Co., Ltd. ("Goldstar"). NSA purchased DRAMs manufactured by Goldstar from an unnamed reseller, and entered 38 shipments between February 17, 1994 and April 28, 1995. At the time of entry, an antidumping duty order was in effect covering DRAMs imported by NSA. See Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea, Antidumping Duty Order and Amended *Final Determination, 58 Fed. Reg.*

27,520 (May 10, 1993). Pursuant to the antidumping order of May 10, 1993, Commerce issued suspension instructions on May 25, 1993 ordering Customs to require NSA to post cash deposits of estimated antidumping duties applicable to the merchandise at issue, and such deposit was made. These suspension instructions provided deposit rates for all entries at the manufacturer's rate, and did not provide separate rates for importers or resellers. *Id. at 27,522*.

On June 15, 1994, Commerce initiated an administrative review of imports of DRAMs manufactured by Goldstar and Hyundai Electronics Co., Ltd. ("Hyundai"), another Korean manufacturer of DRAMs, that were imported into the United States from October 29, 1992 through April 30, 1994 ("POR 1"). *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 59 Fed. Reg. 30,770 (June 15, 1994)*. Upon conclusion of the administrative review, Commerce determined that the dumping margin for Goldstar was 0.00%. Dynamic Random Access Memory Semiconductors of One Megabit or Above from the *Republic of Korea, Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 20,216, 20,222 (May 6, 1996)*.

On June 15, 1995, Commerce initiated a second administrative review of imports of DRAMs manufactured by LG Semicon and Hyundai that were imported into the United States from May 1, 1994 through April 30, 1995 ("POR 2"). *Initiation of Antidumping and Countervailing Duty Administrative Review, 60 Fed. Reg. 31,447 (June 15, 1995)*. Commerce determined that the dumping margin for LG Semicon was de minimis at 0.01%. Dynamic

Random Access Memory Semiconductors of One Megabit or Above from the *Republic of Korea, Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 965, 968 (Jan. 7, 1997).*

Subsequently, Defendant-Intervenor Micron Technology, Inc. ("Micron") filed an action in opposition to the rates determined in POR 1 and POR 2 for LG Semicon. The Court of International Trade and the Court of Appeals for the Federal Circuit sustained the results of the first and second administrative reviews for LG Semicon DRAMs. *Micron Technology v. United States, 23 CIT 55, 44 F. Supp. 2d 216 (1999); Micron Technology v. United States, 23 CIT 208, 40 F. Supp. 2d 481 (1999).*

In addition, prior to the conclusion of the Micron cases, Commerce issued final results for a third administrative review period covering LG Semicon and Hyundai DRAMs that were imported from May 1, 1995 though April 30, 1996 ("POR 3"). During POR 3, Commerce issued instructions to Customs to liquidate entries of LG Semicon and Hyundai DRAMs during that period irrespective of the identity of the importer.

Upon conclusion of the Micron cases, Commerce instructed Customs to assess antidumping duties on NSA's imports of LG Semicon DRAMs at the manufacturer's cash deposit rate upon entry. Commerce did not instruct Customs to liquidate NSA's entries at the rates determined for POR 1 or POR 2.

NSA contests the Liquidation Instructions and moves for summary judgment on the grounds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and were issued without advance notice to NSA.

Commerce argues that the Court lacks subject matter jurisdiction under *28 U.S.C. § 1581(i)*. Alternatively, Commerce argues that NSA has not exhausted its administrative remedies or that otherwise the Liquidation Instructions are rational and in accordance with law.

II. STANDARD OF REVIEW

Assuming that the Court has jurisdiction pursuant to *28 U.S.C. § 1581(i)*, *28 U.S.C. § 2640(e) (1994)* governs this case. *Section 2640 (e)* establishes the standard of review in an action brought under *28 U.S.C. § 1581(i)*, providing that "in any civil action not specified in this section, the Court of International Trade shall review the matter provided in *section 706* of title 5." Accordingly, the Court "shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *5 U.S.C. § 706.*

III. DISCUSSION

A. The Court has residual jurisdiction under *§ 1581(i).*

As a threshold matter, Commerce argues that the Court lacks residual jurisdiction pursuant to *28 U.S.C. § 1581(i)*. Commerce claims that NSA had an alternative remedy under *§ 1581(c)*. It claims that NSA could have filed an independent request for an administrative review and/or participated in POR 1 and POR 2 under *§ 1581(c)*. Commerce argues that this alternative remedy renders *§ 1581 (i)* residual jurisdiction unavailable.

NSA argues that Commerce's prior practice dictated that the rates determined during the administrative review periods applied to all importers of the subject merchandise. This was the governing

practice irrespective of whether the importer filed an individual request for an administrative review. In support of this argument, NSA points to *Consol. Bearings Co. v. United States*, *25 CIT , 166 F. Supp. 2d 580 (2001)* and *ABC International Traders, Inc. v. United States*, *19 CIT 787 (1995)*. Additionally, NSA points to two notices recently published by Commerce. See "Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties," *68 Fed. Reg. 23,954 (May 6, 2003)* ("Final Notice"); "Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Amendment to Notice of Opportunity To Request Administrative Review," *68 Fed. Reg. 26,288 (May 15, 2003)* ("Amendment to Final Notice"). NSA argues that these notices constitute Commerce's admission that the Liquidation Instructions constituted a change from its past practice without notice and that, prior to the issuance of the Liquidation Instructions, entries for a given importer such as NSA were liquidated at the rate determined for the producer of the subject merchandise in the administrative review.

The merits of this action and the resolution of the jurisdictional issue are intertwined. Pursuant to *§ 1581 (i)*, the Court does not possess jurisdiction to decide issues relating to antidumping law if review is specifically provided for by other subparagraphs of *§ 1581*. "It is well established that the residual jurisdiction of the court under *subsection 1581 (i)* 'may not be invoked when jurisdiction under another subsection of *§ 1581* is or could have been available, unless the relief provided under that other subsection would be manifestly inadequate.'" *Consolidated*, *25 CIT at , 166 F. Supp. 2d at 583* (quoting *Ad Hoc*

Comm. of Fla. Producers of Gray Portland Cement c. United States, 22 CIT 902, 906, 25 F. Supp. 2d 352, 357 (1998) (internal citation omitted) (emphasis in original)).

In Consolidated, Commerce issued liquidation instructions that required Customs to assess antidumping duties on the plaintiff-importer's entries of the subject merchandise at the cash deposit rates in effect at the time of entry instead of at the weighted-average rates determined for the subject merchandise in the amended final results of the administrative review. The plaintiff-importer contested the instructions on the grounds that they were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and requested that Customs apply the liquidation rates determined in the administrative review. The court found that it "[was] appropriate to exercise residual jurisdiction because jurisdiction under other subsections of *section 1581 [was]* not available." *Id. at 583.*

The court explained that:

> Commerce's liquidation instructions also are not reviewable under *subsection 1581(c)* because they were not part of the Final Results or the Amended Final Results. Rather, such instructions are issued after relevant final determinations are published and, accordingly, it was impossible for [the importer] to contest the instructions as required under *19 U.S.C. § 1516a(a)(2)(B)(iii) (1994)* ... Finally, none of the other subsections of *section 1581 of Title* 19 provides a viable basis for jurisdiction.

Id.

In the instant case, Commerce did not publish the Liquidation Instructions until November 1, 1999. This was after the final results of POR 1 and POR 2 were published on May 6, 1996 (*61 Fed. Reg. 20,216*) and January 7, 1997 (*62 Fed. Reg. 965*), respectively. The Liquidation Instructions changed Commerce's prior instructions in message number 7128114 issued for POR 2, dated May 8, 1997. Those instructions ordered Customs to liquidate "all entries covered by the [Order] at the rates established in the administrative reviews for the three Korean manufacturers: Goldstar, Hyundai, and Samsung." In addition, the reasoning set forth in ABC dictated that in the absence of another or "all other" rate, all importers of the subject merchandise were covered by the review. Thus, it was reasonable for NSA to assume that its entries would be liquidated at the administrative review rates and that it need not file an independent request for an administrative review pursuant to *§ 1581(c). NSA*, as an importer of DRAMs covered in POR 1 and POR 2, should have been able to rely on such assessment without apprehension that Commerce would change its mind later and change the properly assessed rates. *Consolidated, 25 CIT at , 166 F. Supp. 2d at 593.*

Likewise, in ABC, the court held that the manufacturers' rates determined in the admin trative review applied to the plaintiff-reseller since ere was no other rate that could have applied:

> Absent an applicable reseller, or even an 'all other' rate, [the plaintiff] should have known that it would have been assigned the only existing rates, that is, the manufacturers' duty

> rates determined in the final results of the various administrative reviews. The fact that no review was requested to establish rates for the resellers at issue, or for ABC individually, does not compel Commerce to apply the automatic assessment regulation in this case. In fact, Commerce is compelled to apply the manufacturers' rates as determined on review, because no reseller rates exist. *ABC, 19 CIT at 790.*

Similarly, at the time of entry, a *§ 1581(c)* request by NSA was wholly unnecessary, thereby failing to provide an adequate remedy under the reasoning set forth in ABC. Finally, Commerce does not present the argument that any other subsection of *§ 1581* provided NSA with an adequate remedy, and the Court finds no other subsection of *§ 1581* applicable.

Accordingly, the Court exercises jurisdiction over the matter under *28 U.S.C. § 1581(i).*

B. The exhaustion doctrine does not dictate dismissal of NSA's claim.

Commerce argues that the exhaustion doctrine applies since Commerce never had an opportunity to properly consider NSA's argument. This was allegedly because NSA never presented the issue to Commerce in the appropriate administrative proceeding. NSA asserts that the exhaustion doctrine does not apply to the instant case because its circumstances qualify it as an exception. Specifically, NSA maintains that it had no reason to expect that Commerce would refuse to apply the manufacturer's rates to its entries. Alternatively,

NSA claims that the issue at hand is of a purely legal nature that requires no further agency involvement.

The exhaustion doctrine requires that a party present its claims to the relevant administrative agency for the agency's consideration before bringing these claims to the Court. *Consolidated, 25 CIT at , 166 F. Supp. 2d at 586* (citing *Compensation Comm'n of Alaska v. Aragon, 11 Alaska 236, 329 U.S. 143, 155, 91 L. Ed. 136, 67 S. Ct. 245 (1946)*). However, there is no absolute requirement of exhaustion in the Court of International Trade in non-classification cases. Id. (citing *Alhambra Foundry Co. v. United States, 12 CIT 443, 446-47, 685 F. Supp. 1252, 1255-56 (1988)*). Thus, the Court has the discretion to determine proper exceptions to the doctrine of exhaustion. Id.

Exceptions to the requirement of exhaustion have been found where requiring it (1) would be futile or (2) would be "inequitable and an insistence of a useless formality." See *Rhone Poulenc, S.A. v. United States, 7 CIT 133, 583 F. Supp. 607, 610 (1984); United States Cane Sugar Refiners' Ass'n v. Block, 3 CIT 196, 201, 544 F. Supp. 883, 887 (1982)*. A second exception exists where the "question is one of law and does not require further factual development and, therefore, the court does not invade the province of the agency by considering the question." See id.

The circumstances in the instant case fall under the "pure question of law" exception to the exhaustion doctrine. In Consolidated, the court set out the requirements for the "pure question of law" exception as follows: (a) plaintiff's argument is new; (b) this argument is of a purely legal nature; (c) the inquiry shall require neither further agency involvement nor

additional fact finding or opening up the record; and (d) the inquiry shall neither create undue delay nor cause expenditure of scarce time and resources. See *Consolidated, 25 CIT at , 166 F. Supp. 2d at 587.* This instant case presents a pure question of law that fits squarely within this exception for the reasons that follow: (a) NSA's presents a new argument to the Court; (b) the inquiry involves a question of law - namely, whether Commerce's liquidation instructions are arbitrary and capricious; (c) the inquiry does not require any special expertise by Commerce and/or the development of a special factual record either before or after the Court's consideration of the issue; and (d) for the reason mentioned in part (c), judicial inquiry here will not create undue delay or unnecessary expenditure. Id.

C. The Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

NSA argues that the Liquidation Instructions are arbitrary, capricious, and contrary to law and were issued without advance notice to NSA. Commerce contends that the Liquidation Instructions are rational and in accordance with law, and were issued within the scope of its authority.

Commerce argues that since NSA did not argue that LG Semicon knew its goods were destined for export to the United States, NSA is not covered by the administrative reviews. In support of its argument, Commerce refers to the "knowledge test" upheld in *NSK Ltd. v. Koyo Seiko Co., 190 F.3d 1321, 1334 (Fed. Cir. 1999).* Commerce's argument is flawed. The knowledge test that was upheld in NSK only applies to

the producer, LG Semicon, and speaks nothing of the application of the administrative reviews to the importer, NSA. See generally id. The knowledge test as it stands in *NSK* is inapplicable to this case. Therefore, Commerce asks the Court to hold that the knowledge test stands for the proposition that the importer is only covered by an administrative review if the producer knew that its goods were destined for export to the United States. See Defendant's Response in Opposition to Plaintiff's Motion for Judgment upon the Agency Record, 20. However, Commerce has not spoken of this application of the knowledge test in the past. Additionally, Commerce failed to speak of this application of the knowledge test in the liquidation instructions issued in POR 1 and POR 2 and, thereby, issued the contested instructions without explaining the basis for its action. Therefore, this application of the knowledge test was unwarranted. See *Consolidated, 25 CIT at , , 166 F. Supp. 2d at 589, 590* ("If the Department of Commerce fails to explain the basis for its liquidation instructions, Commerce's action is arbitrary and capricious.").

In Consolidated, the court found arbitrary and capricious liquidation instructions that changed Commerce's previous practice of liquidating at the rate determined in the administrative review but instead liquidated at the cash deposit rate. The court found the instructions arbitrary, in part, because they were not clear to the plaintiff and were completely contrary to instructions that were issued previously. The court saw the following problems with Commerce's action:

> Considering that on September 9, 1997, Commerce already instructed Customs to

> liquidate certain entries subject to the review at certain rates, it is entirely unclear to this Court why, almost a year later, Commerce felt compelled to issue the liquidation instructions at issue if, as Commerce now contends, the conclusions contained in these liquidation instructions were already self-evident from the very same record and from the previously issued September 9, 1997, instructions ... Such action by Commerce shows that Commerce contemplated a scenario under which certain entries of the [subject merchandise], including [the merchandise] manufactured by the [plaintiff-importer] could have been liquidated at one rate prior to the issuance of the contested liquidation instructions and an entirely different rate after the issuance of [said] instructions. *Id. at 592.*

The Court finds the same problem with the Liquidation Instructions in the instant case. Commerce issued new instructions on November 1, 1999 and, thereby, changed its past practice of liquidating at "the rate established for the most recent period for the manufacturer of the merchandise." *61 Fed. Reg. 20,216, 20,222.* The Liquidation Instructions were issued without notice to NSA, which had no reason to know that Commerce would change the instructions and require it to request a separate and independent administrative review. Commerce's past practice and the reasoning set forth in ABC and Consolidated gave NSA a reasonable expectation that their entries were covered by the rates established in POR 1 and POR 2, and therefore that they would not need to file an independent request for an administrative review. The Final Notice and Amendment to Final Notice appear to

acknowledge Commerce's past liquidation practice. See *68 Fed. Reg. 23,954*; *68 Fed. Reg. 26,288*. NSA had no reason to know that their entries were not covered by the rates determined in POR 1 and POR 2. Commerce failed to explain the basis for the Liquidation Instructions at issue and failed to provide NSA with notice of the change. See *Consolidated, 25 CIT at , 166 F. Supp. 2d at 590*. Therefore, the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Id.

IV. CONCLUSION

For the aforementioned reasons, the Court finds that jurisdiction attaches under *28 U.S.C. § 1581(i)* and that NSA's claim is not precluded by the exhaustion doctrine. In addition, for the reasons stated herein, the Court finds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Pursuant to this opinion, this case is remanded to Commerce to (1) rescind the Liquidation Instructions and (2) issue new instructions ordering Customs to liquidate and/or re-liquidate NSA's entries at the antidumping rates determined for LG Semicon during POR 1 and POR 2.

Richard W. Goldberg

Senior Judge

Date: August 18, 2003, New York, New York

Footnote

n1 It has since become the U.S. Bureau of Customs and Border Protection per the Homeland Security Act of 2002, § 1502, Pub. L. No. 107-296, 116 Stat. 2135, 2308-09 (Nov. 25, 2002), and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. 108-32, p. 4 (Feb. 4, 2003).

04-1469, -1492

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NISSEI SANGYO AMERICA, LTD. (now Hitachi High Technologies America, Inc.),
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant, and
MICRON TECHNOLOGY, INC.,
Defendant-Appellant.

October 18, 2005, Decided

October 18, 2005, Filed

NOTICE: THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NONPRECEDENTIAL OPINIONS OR ORDERS.

OPINION: ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANTS, * and the petition for rehearing having been referred to

the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 25, 2005.

Footnote

* The United States and Micron Technology, Inc. each filed a response.

02-1634, 02-1635

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CONSOLIDATED BEARINGS COMPANY,
Plaintiff-Cross Appellant,

v.

UNITED STATES,
Defendant-Appellant.

October 29, 2003, Decided

COUNSEL: Christopher R. Wall, Pillsbury Winthrop LLP, of Washington, DC, argued for plaintiff-cross appellant.

David Silverbrand, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellant.

On the brief was David M. Cohen, Director. Of counsel were John D. McInerney, Patrick V. Gallagher, and Bernicce A. Browne, Attorneys, United States Department of Commerce, of Washington, DC.

Michael D. Esch, Hale and Dorr LLP, of Washington, DC, for amicus curiae Micron Technology, Inc. With him on the brief was Cris R. Revaz.

David J. Levine, McDermott, Will & Emery, of Washington, DC for amicus curiae Hitachi

Semiconductor (America) Inc.; and Michael E. Roll, Katten Muchen Zavis Rosenman, of Los Angeles, California, for amicus curiae Hitachi High Technologies America, Inc.

JUDGES: Before CLEVENGER, RADER, and PROST, Circuit Judges.

OPINION BY: RADER

OPINION: RADER, Circuit Judge.

When the United States Court of International Trade reached a final decision in a complex case involving antidumping liquidation procedures for imports, both Defendant- Appellant United States and Plaintiff-Cross Appellant Consolidated Bearings Company (Consolidated) appealed. *Consolidated Bearings Co. v. United States*, 2002 Ct. Intl. Trade LEXIS 71, 02-72 (CIT July 24, 2002) (Consolidated IV). After finding it possessed jurisdiction, *Consolidated Bearings Company v. United States*, 166 F. Supp. 2d 580 (CIT 2001) (Consolidated I), the trial court's decision in Consolidated IV affirmed the United States Department of Commerce's (Commerce) April 1, 2002 Final Results of Redetermination Pursuant to Court Remand (Remand II).[1]

Because no other subsection of 28 U.S.C. § 1581 was or could have been a basis for jurisdiction in this case, trial court was correct in finding jurisdiction under section 1581(i). In addition, this court agrees with the trial court's holding that the exhaustion doctrine does not apply in this case, but does not agree that the "pure question of law" exception applies. Finally, because the

Court of International Trade erred in interpreting 19 U.S.C. § 1675(a)(2)(C) (2000), this court vacates the judgment below and remands for further proceedings consistent with this opinion.

I.

Commerce issues antidumping duty orders for imported merchandise that is sold in the United States below its fair value and materially injures or threatens to injure a domestic industry. See 19 U.S.C. § 1673e (2000); 19 U.S.C. § 1673d (2000). These antidumping duties reflect the difference between the foreign exporter's sales price and the domestic price of the merchandise. See 19 U.S.C. § 1673e(a)(1) (2000). Upon entry of merchandise covered by an antidumping order, an importer must make a cash deposit of estimated duties (cash deposit rate). See 19 U.S.C. § 1673e(a)(3) (2000).

Under Commerce's accounting system, the actual liquidation of entries subject to an antidumping order may occur years after importation. Before final liquidation, any interested party may request an administrative review of the antidumping duty order. See 19 U.S.C. § 1675 (2000). The final results of such a review "shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties." 19 U.S.C. § 1675(a)(2)(C) (2000). Without a request for administrative review, Commerce liquidates the merchandise at the cash deposit rates (i.e., the deposit rates at the time of entry). See 19 C.F.R. § 351.212(c)(1)(i) (2003).

In 1989, Commerce issued antidumping duty orders on antifriction bearings (AFBs) from Germany. See Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof from the Federal Republic of Germany, 54 Fed. Reg. 20,900 (May 15, 1989) (the 1989 orders). Between 1989 and 1997, Consolidated purchased and imported AFBs manufactured in Germany by FAG Kugelfischer Georg Schaefer KgaA (FAG). Consolidated did not purchase the AFBs directly from FAG. Rather, Consolidated imported the AFBs from an unrelated foreign reseller. Upon importation of the AFBs under the 1989 orders, Consolidated paid cash deposits of estimated duties based on the rates assigned to the manufacturer FAG.

In 1990, various domestic importers of AFBs manufactured by FAG requested an administrative review. Commerce initiated the review on June 11, 1990 and published its final results on July 11, 1991.[2] Consolidated did not request or participate in the administrative review. After the Court of International Trade adjudicated some challenges to those final results, Commerce issued its amended final results (the final results).[3] Under these final results, each participating importer of FAG-manufactured AFBs received a new specific duty rate. Information concerning Consolidated's imports and the reseller that exports to Consolidated was not presented to Commerce in the administrative review.

In September 1997, the United States Customs Service (Customs) received liquidation instructions from Commerce. These instructions implemented the final results for the liquidation of AFB entries for the

participating importers (the 1997 instructions). Because Consolidated was not a party to the administrative review, the final results did not contain a new antidumping rate specifically for Consolidated or the reseller that exports to Consolidated. On August 4, 1998, Customs again implemented liquidation instructions from Commerce. These 1998 instructions directed Customs to liquidate all entries of AFBs from Germany that had not been liquidated by the 1997 instructions. Under the 1998 instructions, Customs liquidated the remaining merchandise at the cash deposit rate in effect at the time of entry. These 1998 instructions required liquidation of Consolidated's entries at the time-of-entry cash deposit rates, which were much higher than the rates for the participating importers under the final results.

Consequently, Consolidated brought this action to challenge the 1998 instructions and compel Commerce to apply the antidumping rates in the final results to Consolidated's entries of AFBs from Germany. Specifically, Consolidated contends that Commerce should apply to Consolidated's entries a rate equal to a weighted-average of the rates established in the final results for FAG-manufactured AFBs. In Consolidated I, the Court of International Trade found jurisdiction, found no violation of the exhaustion doctrine, entered judgment on the merits in favor of Consolidated, and remanded the case for Commerce to reassess the antidumping duty. 166 F. Supp. 2d at 582-93. The Court of International Trade ultimately affirmed Commerce's actions in Remand II. See Consolidated VI, 02-72 at 4.

The Court of International Trade invalidated the 1998 instructions as an unlawful correction or modification of

the 1997 instructions. *See Consolidated II*, 182 F. Supp. 2d at 1382-83. Commerce expressed its opinion that the trial court was in error. Nevertheless, to comply with the remand order, Commerce annulled the 1998 instructions and used the ad valorem rates in the 1997 instructions (from the final results) for liquidation of Consolidated's FAG-manufactured AFB imports. In this appeal, Commerce challenges the trial court's judgment on the merits in Consolidated I, and Consolidated challenges the trial court's affirmance of Commerce's second remand determination in Remand II. This court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(5) (2000).

II.

Subject Matter Jurisdiction

This court reviews the trial court's subject matter jurisdiction ruling as a legal determination without deference. *See JCM, Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 2000). Consolidated sought jurisdiction under title 28's residual jurisdiction provision:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for (1) revenue from imports or tonnage; (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; (3) embargoes or other quantitative restrictions

> on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.
>
> This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516a(a) of the Tariff Act of 1930.

28 U.S.C. § 1581(i) (2000). Section 1581(i) (subsection (i)) supplies jurisdiction only for instances when no other subsection of that section "is or could have been available," unless the other subsection provided no more than a manifestly inadequate remedy. *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), cert. denied, 484 U.S. 1041, 98 L. Ed. 2d 859, 108 S. Ct. 773 (1988)).

Commerce contends that 28 U.S.C. § 1581 (c) (subsection (c)) could have been available to establish jurisdiction in this case if Consolidated had participated in the administrative review that produced the final results. Subsection (c) grants the Court of International Trade jurisdiction over actions brought under section 516A of the Tariff Act of 1930, which includes challenges to the final results of an administrative review by a participant in that review. See 28 U.S.C. § 1581(c) (2000); 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). Subsection (i) specifically states that "this subsection

shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable . . . by the Court of International Trade under section 516A(a) of the Tariff Act of 1930." 28 U.S.C. § 1581(i) (2000). According to Commerce, Consolidated cannot maintain this action under subsection (i) because it could have brought the same action under subsection (c) if it had joined the administrative review process. In other words, Commerce asks this court to bar Consolidated from jurisdiction under subsection (i) because it did not participate in the administrative review.

Consolidated, however, did not bring this action to challenge the final results of the administrative review. If that were the case, Commerce's position might have more merit. Consolidated does not object to the final results. Rather Consolidated seeks application of those final results to its entries of AFBs manufactured by FAG. This case involves a challenge to the 1998 instructions, which is not an action defined under section 516A of the Tariff Act. Stated otherwise, in this action, Consolidated challenges the 1998 instructions as a violation of 19 U.S.C. § 1675(a)(2)(C) and as a departure from Commerce's well-established past practice of liquidation. Because Consolidated is not challenging the final results, subsection (c) is not and could not have been a source of jurisdiction for this case.

In addition to finding this case outside the jurisdictional grants in subsection (c), this court finds this case squarely within the provisions of subsection (i). Commerce's liquidation instructions direct Customs to implement the final results of administrative reviews.

Consequently, an action challenging Commerce's liquidation instructions is not a challenge to the final results, but a challenge to the "administration and enforcement" of those final results. Thus, Consolidated challenges the manner in which Commerce administered the final results. Section 1581(i)(4) grants jurisdiction to such an action.

Moreover, liquidation instructions direct Customs to impose antidumping duties to protect domestic markets. As a result, an action against those instructions also arises as a challenge to "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(2) (2000). This court, therefore, concludes that the trial court correctly asserted jurisdiction under 28 U.S.C. § 1581(i)(2) and (4).

Exhaustion of Administrative Remedies

Proper subject matter jurisdiction does not finish the jurisdictional inquiry. In the Court of International Trade, a plaintiff must also show that it exhausted its administrative remedies, or that it qualifies for an exception to the exhaustion doctrine. See 28 U.S.C. § 2637(d) (2000) ("the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies"). While enforcing exhaustion requirements as jurisdictional prerequisites, the Court of International Trade also enjoys discretion to identify circumstances where exhaustion of administrative remedies does not apply. *See Cemex, S.A. v. United States*, 133 F.3d 897, 905 (Fed. Cir. 1998).

Generally, "the doctrine of exhaustion of administrative remedies provides 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *McKart v. United States*, 395 U.S. 185, 193, 23 L. Ed. 2d 194, 89 S. Ct. 1657 (1969) (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 82 L. Ed. 638, 58 S. Ct. 459 (1938)). If a party does not exhaust available administrative remedies, "judicial review of Commerce's actions is inappropriate." *Sharp Corp. v. United States*, 837 F.2d 1058, 1062 (Fed. Cir. 1988). Over the years, the Court of International Trade has identified various exceptions to the exhaustion requirement. For instance, in the proceedings below, the trial court identified various exceptions to the exhaustion doctrine, including the "futility" exception and the "pure question of law" exception. *See Consolidated I*, 166 F. Supp. 2d at 586. Ultimately, the court applied the "pure question of law" exception to this case. See *Consolidated I*, 166 F. Supp. 2d at 587.

The trial court accepted Consolidated's view that "this case presents a pure legal issue that . . . requires only an examination of [19 U.S.C. § 1675(a)(2)] . . . It does not . . . require the application of any special . . . expertise [from Commerce] for the development of a special factual record either before or after the Court's consideration of the issue." Id. Consolidated, however, did not argue only that 19 U.S.C. § 1675 requires Commerce to apply the final results to its AFB entries. In addition, Consolidated argues that Commerce violated its well-established prior practice of applying the final results of administrative reviews to importers who did not participate in the review, but import the same merchandise from resellers without their own

established antidumping rates. Thus Consolidated alleged that Commerce arbitrarily changed its well-established practice and contravened the reasonable expectations of importers. These allegations require a factual record of Commerce's past practice and an assessment of Commerce's justifications for any departure from that past practice. Statutory construction alone is not sufficient to resolve this case. Accordingly, this court finds that this case does not qualify for the "pure question of law" exception to the exhaustion doctrine.

Nevertheless, this court finds that Consolidated did not fail to exhaust its administrative remedies. Because, as noted earlier, Consolidated challenges liquidation instruction practices and not the administrative review itself, its failure to participate in the administrative review does not preclude judicial review. Indeed, the United States could not identify any administrative process available to challenge liquidation instructions issued by Commerce. The record in this case does not disclose any statutory or regulatory provision that allows a party to challenge the manner in which Commerce implements the final results of an administrative review. Without an administrative procedure to exhaust, this court holds that Consolidated did not violate the exhaustion doctrine. Thus, the trial court properly exercised jurisdiction over the merits of this action.

Requirements of 19 U.S.C. § 1675(a)(2)(C)

Turning to the merits, "this Court will apply the standard of review set forth in 5 U.S.C. § 706 to an action instituted pursuant to 28 U.S.C. § 1581(i)."

Humane Soc'y of the United States v. Clinton, 236 F.3d 1320, 1324 (Fed. Cir. 2001). In other words, this court reviews the trial court's decision de novo, reapplying the same standard utilized by that court. Section 706 of Title 5 of the United States Code states:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title

> or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

The Court of International Trade dismissed Consolidated's allegations that Commerce, by issuing the 1998 instructions, violated Consolidated's Fifth Amendment Due Process rights and the procedural requirements of the Administrative Procedure Act. *Consolidated I*, 166 F. Supp. 2d at 589-90. Consolidated does not re-assert those arguments on appeal. Therefore, Commerce's liquidation instructions in this case will only be set aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The trial court determined that Commerce's 1998 instructions both violated 19 U.S.C. § 1675(a)(2)(C) and arbitrarily departed from its established past practice. Turning first to the alleged statutory violation, this court reviews statutory interpretation without deference. *See Lynteq, Inc. v. United States*, 976 F.2d 693, 696 (Fed. Cir. 1992). The Court of International Trade held that the framework of section 1675(a)(2) does not permit Commerce to reassess antidumping duties after an administrative review and issuance of instructions to implement the results of that review. According to the trial court, the 1998 instructions were an unlawful modification of the rates applied by the 1997 instructions.

Section 1675 sets forth the framework for an administrative review of antidumping duties. This section clearly places the focus of the administrative review on the entry of merchandise. For example, section 1675(a)(2)(A) requires Commerce to "determine . . . the normal value and export price (or constructed export price) of each entry of subject merchandise, and . . . the dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A) (emphases added).

Thus, antidumping duties ensure that each import reflects correct market values. Once the review sets the market value of the merchandise, the focus shifts to importation of the merchandise, not the character of the merchandise itself. Accordingly, importers of the same merchandise can have different antidumping duties, just as the final results in this case established various importer-specific rates for those who participated in the review. The character of the merchandise does not control the assessment of duties, but the market forces in play at the time of each separate import transaction. The simple fact that one importer imports the same merchandise as another importer does not necessarily lead to the conclusion that they are subject to the same antidumping duties. Because sales prices vary from exporter to exporter and from time to time, separate entries of the same good may have different duties.

During an administrative review, Commerce analyzes the data related to the manufacturer and third-party resellers that export the subject merchandise to the United States. If no information about import transactions with a particular reseller is before Commerce during the review, then the transactions of an importer who imports the subject merchandise from

that reseller do not fall within the scope of the review. In Remand II, Commerce reasonably explained as follows:

> It is our view that we did not conduct a review of all FAG-produced merchandise regardless of the exporter or reseller of this merchandise. We initiated this administrative review for FAG and our mandate was to review FAG's pricing practices with respect to its sales of subject merchandise. The mandate did not extend to other parties which may have acquired FAG-produced bearings second- or third-hand and then exported or resold these bearings in the United States. In cases in which resales are beyond the control of the reviewed party, such as FAG, it is our practice to review the pricing practices of the reseller when we are asked to do so. To do otherwise, in our opinion, would permit the circumvention of the antidumping law by allowing the resellers to benefit because they may be dumping to a greater extent than the party under review during the period in question. Therefore, we did not issue the liquidation instructions of August 4, 1998, to the U.S. Customs Service to correct for errors or deficiencies in the September 9, 1997, instructions. Rather, the purpose of the August 4, 1998, instructions was to cover imports not subject to the scope of the September 9, 1997, instructions.

With this framework in mind, section 1675(a)(2)(C) takes on particular significance for this case. That section requires the final results of an administrative

review to "be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties." 19 U.S.C. § 1675(a)(2)(C) (2000) (emphasis added). This subsection requires Commerce to apply the final results of an administrative review to all entries covered by the review. If the review did not examine a particular importer's transaction, then that importer's entries enjoy no statutory entitlement to the rates established by the review. The "entries" must be "covered by the determination" to gain entitlement to the review's results as the "basis for the assessment" of duties. Id.

Commerce's analysis of one transaction or entry does not necessarily produce rates applicable to a wholly separate and distinct transaction. Subsection 1675(a)(2)(C) requires Commerce to apply the final results to those transactions covered in the review. The subsection neither requires nor precludes Commerce from applying those results to entries outside the review. Because subsection 1675(a)(2)(C) does not compel Commerce to apply the final results of an administrative review to any entries of merchandise that were not covered in the administrative review, this court reverses the contrary holding of the trial court.

The sales practices of the reseller that exports the AFBs to Consolidated were simply not covered by the administrative review. Therefore, Consolidated's imports are not within the scope of the final results or the 1997 instructions. This court is not persuaded by any of Consolidated's arguments that the rates in the final results, and not the cash deposit rates at the time of entry, must apply to Consolidated's imports.

Consolidated simply has no statutory entitlement under section 1675(a)(2)(C) to the antidumping rates in the final results over those cash deposit rates.

Consolidated's Actions

Because title 19 does not afford Consolidated a statutory right to relief, as explained above, Consolidated is left with its argument that Commerce's 1998 instructions arbitrarily departed from its well-established liquidation practices. Consolidated argues that Commerce has consistently, in the past, applied a weighted average of the manufacturer's dumping rates in the final results to an importer that imports merchandise made by the manufacturer from an unaffiliated reseller not covered by the administrative review. Relying on that past practice, Consolidated alleges that it had no reason to participate in the administrative review. It fully expected Commerce to apply a weighted average of the final results to its imports. Thus, Consolidated charges that Commerce's departure was an arbitrary disruption of expectations without notice.

Commerce recognizes that confusion exists with respect to its policy concerning importation from resellers. In this case, Commerce asserts that it was within its discretion, and not an arbitrary departure from established practice, to liquidate Consolidated's entries at the cash deposit rates at the time of entry, often referred to as "automatic liquidation." Recently, Commerce finalized a notice, which "clarifies the Department of Commerce's . . . regulation, 19 C.F.R. § 351.212(c), regarding automatic liquidation where a [reseller] exports the merchandise." See Antidumping

and Countervailing Duty Proceedings: Assessment of Antidumping Duties, 68 Fed. Reg. 23954 (May 8, 2003). According to that clarification, Commerce will not impose automatic liquidation at the existing cash deposit rates on parties that import, from a reseller, merchandise produced by a manufacturer covered by an administrative review. Id. Rather, Commerce will determine whether the manufacturer had knowledge that the merchandise sold to the reseller was headed for the United States. If the manufacturer had knowledge of the reseller's sales into the United States, Commerce will apply the manufacturer's rate. If the manufacturer had no such knowledge, Commerce will apply the "all others" rate. Id. That clarification applies to all administrative reviews, effective May 1, 2003. Id. The clarification does not help resolution of this case on this record. At most, Commerce's recent policy statements may help identify Commerce's consistent past-practice.

At oral argument, this court asked the parties to identify prior instances where an administrative review was held and Commerce either applied the existing cash deposit rates or the manufacturer's rate in the final results to imports from a reseller not covered by the administrative review. Neither party could identify any specific cases on either side. Further, the record does not contain sufficient evidence to determine Commerce's consistent practice, if any, prior to this case. This court, therefore, finds the record in this case insufficient to facilitate a determination of whether Commerce acted within its discretion or arbitrarily.

The trial court's method of analysis with regard to the issue of arbitrariness was misplaced. Although the trial

court found Commerce's actions arbitrary, it based that determination on its flawed conclusion that section 1675(a)(2)(C) required Commerce to use the final results as the basis for the rates on Consolidated's imports. The trial court considered the 1998 instructions a violation of section 1675(a)(2)(C) because they improperly modified the 1997 instructions that were based on the final results. In other words, the Court of International Trade examined the two instructions at issue for any conflict. The statute, however, does not compel that comparison, nor can that comparison reveal any arbitrariness in Commerce's action. Commerce's expertise endows it with discretion to determine when and how to implement the final results beyond their literal, statutory scope. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) ("Commerce's special expertise in administering the anti-dumping law entitles its decisions to deference from the courts").

Consistent with § 1675(a)(2)(C), the 1997 instructions merely required application of the importer-specific rates to importers within the scope of the review. The 1998 instructions required automatic liquidation for all imports not addressed in the 1997 instructions. Thus, under a proper reading of § 1675(a)(2)(C), the two instructions are not inconsistent. This case requires a determination of whether Commerce had a consistent practice from which it departed when it required automatic liquidation of Consolidated's entries of AFBs. Rather than comparing the 1997 and 1998 instructions to each other, the proper mode of analysis requires comparison of Commerce's actions before this case with Commerce's actions in this case. If that analysis shows

that Commerce acted differently in this case than it has consistently acted in similar circumstances without reasonable explanation, then Commerce's actions will have been arbitrary. See RHP Bearings v. United States, 288 F.3d 1334, 1347 (Fed. Cir. 2002) ("an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently." (Citation omitted.))

In other words, both sets of instructions implemented Commerce's final results. In order to show that the 1998 instructions were arbitrary and capricious, Consolidated must show that Commerce consistently followed a contrary practice in similar circumstances and provided no reasonable explanation for the change in practice. Because the record is not sufficiently developed for resolution of this issue, this court vacates the trial court's judgment that Commerce was arbitrary in its actions and remands the case for further adjudication on this issue. Thus, this court vacates the trial court's affirmance of Commerce's Remand II.

III.

Title 19, § 1675(a)(2)(C), only requires Commerce to apply the final results of an administrative review to those import transactions specifically covered by the review. Consequently, the trial court's holding that the statute compels Commerce to apply the 1997 instructions to the imports of Consolidated is reversed. In addition, this court vacates the judgment of the trial court that Commerce acted arbitrarily and remands for further adjudication consistent with this opinion. On remand, the trial court will have the opportunity to examine whether Commerce had a consistent past-

practice with respect to imports from unrelated resellers not covered by the administrative review, whether there was any departure in this case from a consistent past practice, and whether that departure was arbitrary.

REVERSED, VACATED, and REMANDED

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 In Consolidated I, the United States Court of International Trade remanded the case to Commerce, which resulted in Commerce's November 29, 2001 Final Results of Redetermination Pursuant to Court Remand (Remand I). The Court of International Trade reviewed Remand I and issued a decision in *Consolidated Bearings Company v. United States*, 182 F. Supp. 2d 1380 (CIT 2002) (Consolidated II), which again remanded the case to Commerce resulting in Remand II. The Court of International Trade addressed Commerce's action in Remand II in its third decision, *Consolidated Bearings Company v. United States*, 2002 Ct. Intl. Trade LEXIS 63, 02-62 (CIT July 9, 2002) (Consolidated III). Commerce filed a motion for clarification of that decision on July 18, 2002, which lead to the Court of International Trade's decision in Consolidated IV.

n2 See Antifriction Bearings (Other Than Tapered Rolled Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, 55 Fed. Reg. 23575 (Dep't Commerce June 11, 1990) (initiation of antidumping admin. review); Antifriction Bearings (Other Than Tapered Rolled Bearings) and

Parts Thereof From the Federal Republic of Germany, 56 Fed. Reg. 31692 (Dep't Commerce July 11, 1991) (final results).

n3 See Antifriction Bearings (Other Than Tapered Rolled Bearings) and Parts Thereof From the Federal Republic of Germany, 62 Fed. Reg. 32755 (Dep't Commerce June 17, 1997) (amended final results).

04-1556

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CONSOLIDATED BEARINGS COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

COUNSEL: Christopher R. Wall, Pillsbury Winthrop Shaw Pittman LLP, of Washington, DC, argued for plaintiff-appellant. With him on the brief was William DeVinney.

Cristina Ashworth, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. On the brief were Peter D. Keisler, Assistant Attorney General; David M. Cohen, Director; Jeanne E. Davidson, Deputy Director; and David Silverbrand, Trial Attorney. Of counsel on the brief were John D. McInerney, Chief Counsel, Berniece A. Browne, Senior Counsel, and Patrick V. Gallagher, Jr., Senior Attorney, Office of Chief Counsel for Import Administration, United States Department of Commerce, of Washington, DC.

JUDGES: Before CLEVENGER, RADER, and DYK, Circuit Judges.

OPINION BY: CLEVENGER

OPINION: CLEVENGER, Circuit Judge.

Plaintiff-appellant Consolidated Bearings Company ("Consolidated") appeals the United States Court of International Trade's decision affirming the final results of a redetermination by the Department of Commerce ("Commerce") pursuant to a remand order from the Court of International Trade. *See Consol. Bearings Co. v. United States*, 346 F. Supp. 2d 1343 (Ct. Int'l Trade 2004). In the final results, Commerce determined that it did not depart from a consistent past practice by instructing the United States Customs Service ("Customs") to liquidate Consolidated's unreviewed entries of antifriction bearings ("AFBs") from an unrelated reseller at the original cash deposit rate rather than the manufacturer's rate established pursuant to an administrative review. *Consol. Bearings Co. v. United States*, 2004 Ct. Intl. Trade LEXIS 8, slip op. 04-10, at 6 (Apr. 28, 2004) ("Remand Redetermination"). Because substantial evidence supports Commerce's determination that it has in the past consistently liquidated unreviewed entries from an unrelated reseller at the cash deposit rate when the manufacturer has no knowledge that the subject merchandise is ultimately destined for the United States, we affirm the Court of International Trade's judgment.

I

In 1989, after determining that certain imported AFBs were being sold below fair value in the United States to the detriment of domestic industry, Commerce issued antidumping duty orders concerning AFBs exported from several countries, including Germany. See

Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany, 54 Fed. Reg. 20, 900 (May 15, 1989). Between 1989 and 1997, Consolidated purchased and imported from an unaffiliated foreign reseller AFBs manufactured by FAG Kugelfischer Georg Schaefer KgaA ("FAG"). Consolidated consequently paid cash deposits of estimated antidumping duties based on the rates Commerce assigned to FAG in the antidumping duty orders concerning AFBs.

After receiving requests from domestic importers for an administrative review of the antidumping duty order applicable to AFB imports from FAG and others, Commerce initiated an administrative review on June 11, 1990. See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom Initiation of Antidumping Administrative Reviews, 55 Fed. Reg. 23,575 (June 11, 1990). Because Consolidated did not request an administrative review for the reseller's sales to Consolidated, and neither Consolidated nor the reseller participated in the review, Commerce did not consider Consolidated's entries of AFBs in the review.

On July 11, 1991, Commerce published the final results of the administrative review and stated that "with respect to companies not participating in this review, presumably all interested parties were satisfied with the previously published cash deposit rates for assessment purposes." Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from

the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review, 56 Fed. Reg. 31,692, 31,700 (July 11, 1991). Commerce ultimately amended the results to include weighted-average antidumping duty rates for various exporters, including one for FAG. Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Germany; et al.; Amended Final Results of Antidumping Duty Administrative Reviews, 62 Fed. Reg. 32,755, 32,756 (June 17, 1997). Under these final results, each participating importer of FAG-manufactured AFBs received a new duty rate.

On September 9, 1997, Commerce instructed Customs to liquidate AFBs pursuant to the final results of the administrative review. See Liquidation Instructions for Antifriction Bearings (Other than Tapered Roller Bearings) & Parts Thereof From Germany, Message No. 7252113 (Sept. 9, 1997) ("September 1997 instructions"). Because Consolidated did not participate in the review, the final results did not include a new antidumping duty rate for Consolidated or its reseller. On August 4, 1998, Commerce again instructed Customs that if it was "still suspending liquidation on any entries of AFBs from Germany ... after applying all of the above liquidation instructions, [it] should now liquidate such entries at the deposit rate required at the time of entry of the merchandise" - a rate higher than that set forth in the September 1997 liquidation instructions for named importers of AFBs manufactured by FAG. Liquidation Instructions for AFBs and Parts Thereof from Germany from the Period 11/9/88 Through 4/30/90, Message No. 8216117 (Aug. 4, 1998) ("August 1998 instructions"). Commerce

thereafter liquidated Consolidated's imports of AFBs at the cash deposit rate.

Consolidated filed suit pursuant to 28 U.S.C. § 1581(i) in the Court of International Trade, seeking to invalidate the August 1998 instructions. See *Consol. Bearings Co. v. United States*, 166 F. Supp. 2d 580, 25 Ct. Int'l Trade 546 (Ct. Int'l Trade 2001). The case was ultimately appealed to this court, and we held that 19 U.S.C. § 1675(a)(2)(C) - which explains that a determination of antidumping duties in an administrative review shall "be the basis for the assessment of ... antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties" - does not afford an importer a statutory right to have the results of an administrative review applied to its entries if Commerce did not consider the entries in the review. *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1005-06 (Fed. Cir. 2003). We nonetheless remanded the case for a determination of whether "Commerce had a consistent past-practice with respect to imports from unrelated resellers not covered by the administrative review, whether there was any departure in this case from a consistent past practice, and whether that departure was arbitrary." *Id.* at 1008. The Court of International Trade in turn remanded the case to Commerce. See *Consol. Bearings Co. v. United States*, 2004 Ct. Intl. Trade LEXIS 8, No. 98-09-02799 (Ct. Int'l Trade Jan. 30, 2004).

Upon remand, Commerce identified its past practice with respect to unaffiliated resellers as follows:

> The Department's past practice has been to assess the reseller's sales separately from those

> of the manufacturer, provided that the manufacturer does not have knowledge that its sales to the reseller are ultimately destined for the United States. If the request for review is made for a reseller and its supplier does not know that the reseller is exporting the merchandise to the United States, then the Department will calculate a rate for the reseller based on the reseller's pertinent sales made during the period of review. If a request for review is not made for the reseller, however, then the Department treats the reseller as any unreviewed company and assesses a duty at the rate required on the merchandise at the time of entry ...

Remand Redetermination at 6 (citation omitted).

The Court of International Trade upheld Commerce's assessment of its past consistent practice and ruled that Consolidated's imports were dutiable at the cash deposit rate. *Consol. Bearings*, 346 F. Supp. 2d at 1347-48. The Court of International Trade further determined that Commerce in the past has deviated from this practice only when both of the following factors were present: (1) the importer did not participate in the administrative review; and (2) no rate other than the manufacturer's review rate was assessed by Commerce in the review proceedings. *Id.* at 1347. Because Commerce assessed rates other than the manufacturer's review rate to other resellers, the Court of International Trade determined that a departure by Commerce from its past consistent practice to accommodate Consolidated was not warranted. Id.

Consolidated appeals. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1295(a)(5) (2000).

II

In reviewing decisions by the Court of International Trade in actions pursuant to 28 U.S.C. § 1581(i), we apply the standard of review set forth in the APA and will "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2); *Humane Soc'y of the United States v. Clinton*, 236 F.3d 1320, 1324 (Fed. Cir. 2001) ("This Court will apply the standard of review set forth in 5 U.S.C. § 706 to an action instituted pursuant to 28 U.S.C. § 1581(i)."). "An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors." *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005).

"Substantial evidence" describes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938). To determine if substantial evidence exists, we review the record in its entirety, including all evidence that "fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984).

III

The case is now before us for the limited purpose of determining whether substantial evidence supports Commerce's finding that its August 1998 instructions to Customs reflect a consistent past practice of liquidating unreviewed entries from unrelated resellers at the cash deposit rate rather than the manufacturer's review rate, provided that the manufacturer does not have knowledge that its sales to the reseller are ultimately destined for the United States, or instead are an unjustified departure from a contrary past practice without reasonable explanation. It was Consolidated's burden on remand to prove the latter. *See Consol. Bearings*, 348 F.3d at 1007 ("In order to show that the 1998 instructions were arbitrary and capricious, Consolidated must show that Commerce consistently followed a contrary practice in similar circumstances and provided no reasonable explanation for the change in practice.").

Upon considering all of the evidence set forth by Commerce in its Remand Redetermination, and all of the evidence presented by Consolidated, we conclude that Commerce did not arbitrarily depart from a past practice of liquidating unreviewed entries at the cash deposit rate rather than the manufacturer's review rate.

A

Commerce first calls attention to the distinction in 19 C.F.R. § 353.22(e)(1) (1995) between reviewed and unreviewed entries. During the relevant time period, subsection 353.22(e)(1) read as follows:

> If [Commerce] does not receive a timely request [for an administrative review], [Commerce] ... will instruct the Customs Service to assess antidumping duties on the merchandise ... at rates equal to the cash deposit of ... estimated antidumping duties required on that merchandise at the time of entry ...

19 C.F.R. § 353.22(e)(1) (1995). The existence of a regulation does not, by itself, establish that Commerce consistently acted according to its terms. Subsection 353.22(e)(1) does, however, shed light on what Commerce during the relevant time period publicized its practice to be. In light of our determination in Consolidated Bearings that 19 U.S.C. § 1675 does not afford an importer statutory entitlement to use of the results of an administrative review as the basis for Commerce's assessment of duties on the importer's unreviewed entries, 348 F.3d at 1006, the meaning behind subsection 353.22(e)(1) is clear. Commerce's past practice, at least as described by the regulation, was to liquidate unreviewed entries at the cash deposit rate.

Commerce next states that its practice of assessing antidumping duties on an importer-specific basis was described in the preliminary and final decision notices in the present case, both of which issued well before the August 1998 instructions at issue. See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review, 56 Fed. Reg. 31,692, 31,694 (July 11, 1991) ("We will calculate wherever possible an exporter/importer-specific assessment rate [which will] ... be assessed uniformly on all entries of the class or kind of

merchandise by that particular importer during the review period."); Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews, 56 Fed. Reg. 11,200, 11,201 (Mar. 15, 1991) ("We will calculate an importer-specific ad valorem appraisement rate for each class or kind of antifriction bearings [which] ... will be assessed uniformly on all entries of that particular importer made during the review period."). We agree with Commerce that the notices are consistent with our interpretation of subsection 353.22(e)(1)- i.e., that the notices reflect Commerce's intention to calculate duty rates on an importer-specific basis and Commerce's focus on a given importer's entries of AFBs in calculating and assessing the duties.

Commerce finally offers five actual instructions to Customs to liquidate entries from unreviewed resellers involved in the review of AFBs from France, Japan, Singapore, Sweden and the United Kingdom at the cash deposit rate. The following instruction is representative:

> If you are still suspending liquidation on any entries of AFBs from France during the period 11/9/88 through 4/30/90 after applying all of the above liquidation instructions, you should now liquidate such entries at the deposit rate required at the time of entry of the merchandise.

(App. at 141.) As Consolidated correctly observes, the five instructions pertain to the same administrative review of AFBs that brought about the instructions at

issue here. There is no doubt, however, that they were issued prior to the August 1998 instructions pertaining to Consolidated's entries in this case. In light of the regulatory context provided by subsection 353.22(e)(1) and the lack of any evidence to the contrary, we determine the instructions to be substantial evidence that Commerce's past practice was to liquidate at the cash deposit rate rather than at the manufacturer's review rate all entries not reviewed by Commerce in an administrative review, provided that the manufacturer had no knowledge of the ultimate destination of the subject merchandise. We further agree with the Court of International Trade that Commerce did not arbitrarily depart from that practice here.

B

For its part, Consolidated first points in the record to over one hundred pages of liquidation instructions issued by Commerce to Customs. But Consolidated does little to explain the relevance of any of the instructions beyond an assertion that many provide for the liquidation of "all" subject entries, and that "all" means exactly that - every entry from the manufacturer, regardless of whether it was reviewed. Upon review of the instructions, however, we determine that there simply is no suggestion in any of them that Commerce intended to apply the results of the review of a particular producer to the unreviewed exports of a reseller - no suggestion that "all" encompasses something more than all entries actually reviewed by Commerce in arriving at a final dumping margin determination.

Consolidated also makes much of the Court of

International Trade's findings in *Nissei Sangyo America, Ltd. v. United States*, 2003 Ct. Intl. Trade LEXIS 103, No. 00-00113, 2003 WL 2197 2722 (Ct. Int'l Trade Aug. 18, 2003), *Renesas Technology America, Inc. v. United States*, 2003 Ct. Intl. Trade LEXIS 105, No. 00-00114, 2003 WL 21972721 (Ct. Int'l Trade Aug. 18, 2003), and *ABC International Traders, Inc. v. United States*, 19 C.I.T. 787 (1995), arguing that the court therein found that Commerce has in the past applied a final determination of a manufacturer's dumping margin for particular merchandise to all importers of such merchandise, regardless of whether the importer participated in the administrative review. While the Court of International Trade expressly found in *Nissei* and *Renesas* that Commerce "changed its past practice of liquidating at the rate established for the most recent period for the manufacturer of the merchandise," *Nissei*, 2003 W L 21972722, at *6 (quotation omitted); *see also Renesas*, 2003 WL 21972721, at *6, prior decisions by the Court of International Trade do not constitute evidence of Commerce's past practice and are not binding on this court. Furthermore, the Court of International Trade in *ABC International* rejected the importer's attempts to establish that the Japanese manufacturers at issue in the case had no knowledge of the ultimate destination of their merchandise, and therefore at least implicitly recognized the import to Commerce's antidumping duty calculus of the manufacturer's knowledge of the ultimate destination of subject merchandise. But to the extent that these cases offer some support for the conclusion sought by Consolidated on appeal, we disagree with the findings therein and hold to the contrary that the Court of International Trade did not err in affirming Commerce's determination that it has

consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate.

Finally, Consolidated complains that Commerce did not affirmatively act to provide Consolidated with access to "non-public files" containing Commerce's past instructions to Customs in other cases. Specifically, Consolidated argues that "Commerce should have requested permission to release confidential information" and that "Commerce has not offered any evidence, or even any argument, why obtaining such permission would be an undue burden." (Reply Br. of Appellant at 10-11.) We note, however, that Consolidated does not contend that the Court of International Trade rejected a discovery request from Consolidated to provide these liquidation instructions in redacted form. We have reviewed the record established before the Court of International Trade in this case and have found no proper attempt by Consolidated to pursue additional discovery to gain access to proprietary materials that may have been submitted to Commerce in confidence.

The record discloses that when the Remand Determination was before the Court of International Trade, Commerce averred that "there is some difficulty in demonstrating the consistent language in liquidation instructions regarding the treatment of reviewed and unreviewed companies across different administrative reviews given the proprietary nature of some information in the instructions (i.e., identities of importers/customers) that would have provided more meaning to their use as examples." Rebuttal Comments, July 19, 2004. Commerce did not aver that it had in fact relied on instructions in files covered by such

proprietary restrictions. Neither the Court of International Trade nor this court relies on any information from such files in affirming the Remand Determination. And, as noted above, the record does not disclose any attempt by Consolidated to force release of the proprietary information to which Commerce alluded but on which it did not rely.

Consolidated's complaint that Commerce did not take affirmative steps to liberate certain files from proprietary restrictions, presumably by appropriate redaction of confidential material, has no merit in this case, since the information that was deemed proprietary was not specifically requested and was not used by the agency or the courts in reaching a decision adverse to Consolidated.

Although Commerce may not disclose information designated as proprietary by the person submitting the information without consent of the submitting person, see 19 U.S.C. § 1677f(b)(1)(A) (2000), for Commerce to defend the reasonableness of its position based on proprietary information while refusing to release the information from confidentiality restriction would raise serious questions, as would Commerce's refusal to release information that would contradict the agency's position. Whether Commerce in such a case could by redaction or otherwise satisfy the test of section 1677f(b)(1)(A) would be a matter for the court to decide.

IV

In conclusion, upon reviewing anew the totality of the evidence before the Court of International Trade, and the full record on appeal, we conclude that Consolidated

failed to meet its burden of showing that the August 1998 instructions were arbitrary and capricious, i.e., that Commerce consistently followed a practice in similar circumstances contrary to that outlined in the August 1998 instructions and provided no reasonable explanation for the change in practice. Indeed, substantial evidence supports Commerce's determination that it has consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate.

In reaching this conclusion, however, we reject the Court of International Trade's determination that Commerce in the past has deviated from its consistent practice only when (1) the importer did not participate in the administrative review; and (2) no rate other than the manufacturer's review rate was assessed by Commerce in the review proceedings. Neither Consolidated nor Commerce advocates use of the factors to explain past deviations from Commerce's consistent practice, and we find no support for their use for that purpose in the record.

The decision of the Court of International Trade to affirm Commerce's Remand Redetermination is hereby affirmed.

COSTS

Each party shall bear its own costs.

AFFIRMED

(2)

Supreme Court, U.S.
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No. 05-918

In the Supreme Court of the United States

HITACHI HIGH TECHNOLOGIES AMERICA, INC.,
PETITIONER

v.

UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly sustained the Department of Commerce's practice, in connection with administrative reviews of antidumping duties, of liquidating unreviewed entries from independent resellers at the cash deposit rate rather than the rate determined by a review of entries exported by the producer.

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In the Supreme Court of the United States

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HITACHI HIGH TECHNOLOGIES AMERICA, INC.,
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UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter, but is reprinted in 139 F. App'x 264. The opinion of the Court of International Trade (Pet. App. 7a-23a) is reported at 25 I.T.R.D. (BNA) 2045, and is available at 2003 WL 21972722.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 2005. A petition for rehearing was denied on October 18, 2005 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on January 17, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. The Anti-Dumping Act, 1921, 19 U.S.C. 1673 *et seq.*, and the Tariff Act of 1930, 19 U.S.C. 1001 *et seq.*, have long provided for the imposition of antidumping duties where "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. 1673.[1] If the sale of a product at less than its fair value causes or threatens injury to an industry in the United States, the statute provides for imposition of an antidumping duty "in an amount equal to the amount by which the normal value [*i.e.*, the price when sold 'for consumption in the exporting country'] exceeds the export price [*i.e.*, the price when sold 'to an unaffiliated purchaser in the United States']." 19 U.S.C. 1673, 1677a(a), 1677b(a)(1)(B)(i).

Commerce's publication of an antidumping duty order imposes several requirements. Most significantly for this case, merchandise that is subject to an antidumping duty order may enter the United States only if accompanied by a cash deposit equal to the estimated dumping duties. 19 U.S.C. 1673e(a)(3). The initial cash deposit rate is based upon the dumping margin determined for the manufacturer of the merchandise in the original investigation. If an individual dumping margin was determined for a producer, that margin will be used as the cash deposit rate for its merchandise; if no sepa-

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[1] That language was originally adopted in the Anti-Dumping Act, 1921, ch. 14, § 201, 42 Stat. 11, which, prior to 1979, was codified at 19 U.S.C. 160 *et seq.* (1976). It was subsequently reenacted in 1979 as Title VII of the Tariff Act of 1930, ch. 497, § 1, 46 Stat. 590, as part of a more general revision of customs laws relating to the General Agreement on Tariffs and Trade. See Trade Agreements Act of 1979, Pub. L. No. 96-39, Tit. I, § 101, 93 Stat. 162 (19 U.S.C. 1673 *et seq.*).

rate rate was calculated for the producer, the "all others" rate applies. See, *e.g.*, *Micron Tech., Inc.* v. *United States*, 117 F.3d 1386, 1390 n.5 (Fed. Cir. 1997).

Although cash deposits must be paid on all entries subsequent to an antidumping order, final calculation of duties that are owed on those entries may not occur until years after the goods are physically imported. Before liquidation, *i.e.*, before final calculation and assessment of the duty, the statute permits interested parties to request an administrative review to determine the dumping margin applicable to the entries, which determination is based upon sales of the subject merchandise made during the period of review. 19 U.S.C. 1675. The regulations in effect at the time of the proceedings at issue here allowed any interested party to request a review of specified producers or resellers covered by an order. See 19 C.F.R. 353.22(a)(1) (1994) (request by interested domestic party); 19 C.F.R. 353.22(a)(2) (1994) (producer or reseller could request review of itself), 19 C.F.R. 353.22(a)(3) (1994) (importer could request review of its producer or reseller).[2] If a review is requested, Commerce will conduct an administrative review of merchandise covered by the request.

Section 1675(a)(2)(C) requires the final results of an administrative review to "be the basis for the assess-

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[2] The current version of the regulation, which was relocated as part of a general revision of the antidumping regulations to implement the Uruguay Round Agreements Act, refers to producers and "exporters," rather than resellers. 19 C.F.R. 351.213(b)(1), (2) and (3). The term "exporters" as used in the regulations encompasses resellers. See 19 C.F.R. 204(e)(3). The amended regulations apply to "administrative reviews initiated on the basis of requests made on or after the first day of July 1997," whereas previously initiated reviews, such as those at issue here, "continue to be governed by the regulations in effect on the date the * * * requests were made." 19 C.F.R. 351.701.

ment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties." 19 U.S.C. 1675(a)(2)(C). Commerce therefore applies the final results of an administrative review to all entries "covered by" the review (with the difference between the review rate and the cash deposit rate being either refunded or collected, with interest, as appropriate). *Ibid.*; 19 C.F.R. 353.22(c)(10), 353.24(a) (1994). The rate determined by the administrative review also becomes the cash deposit rate for entries of the subject merchandise that occur before completion of the next review. 19 U.S.C. 1675(a)(2)(C); 19 C.F.R. 353.22(c)(10) (1994). If no administrative review is requested, entries occurring subsequent to the prior review are liquidated at their cash deposit rate. 19 C.F.R. 353.22(e) (1994).

During an administrative review, Commerce separately analyzes information regarding the sales of each producer or reseller reviewed and determines a company-specific dumping margin for the period "for each person reviewed." 19 C.F.R. 353.22(c)(7)(ii) (1994). "If no information about import transactions with a particular reseller is before Commerce during the review, then the transactions of an importer who imports the subject merchandise from that reseller do not fall within the scope of the review," *Consolidated Bearings Co.* v. *United States* (*Consolidated I*), 348 F.3d 997, 1005 (Fed. Cir. 2003), and merchandise imported from that reseller is liquidated at the cash deposit rate, in accordance with 19 C.F.R. 353.22(e) (1994).

In 1998, Commerce sought to clarify its policy in that regard and proposed a modification of its practice. See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties (Assessment I), 63

Fed. Reg. 55,361 (1998). Commerce first explained what information is gathered in the course of its review of a producer and what imports are covered by a producer's review rate. "A [producer] reports sales that it knew at the time of the sale were destined for the United States as its U.S. sales," including sales to a reseller that the producer knows are destined to be resold in the United States, and information regarding those sales is considered in determining the producer's dumping margin for the period under review. *Id.* at 55,363. In contrast, "[t]he producer will report sales of the subject merchandise for which it did not know the destination of the merchandise as foreign market sales," which are not considered in setting the producer's review rate. *Ibid.* Thus, to the extent that merchandise manufactured by the producer and then sold to foreign resellers in "foreign market sales" is subsequently exported to the United States, such transactions are not included in the calculation of the producer's review rate.

Commerce went on to give notice that, in a change from past practice, it proposed to construe the reference in 19 C.F.R. 353.22(e) (1994) to the "cash deposit rate" applicable to unreviewed resellers as the cash deposit rate that would have been collected at the time of entry had Commerce been aware that the merchandise was purchased from an unrelated third-party reseller, *i.e.*, the "all others" rate, rather than the cash deposit rate set for the producer based upon the initial review of the producer's own exports. Assessment I, 63 Fed. Reg. at 55,363. After receiving and reviewing comments, Commerce prospectively implemented in 2003 a policy of liquidating unreviewed resellers' sales at the "all others" rate. See Antidumping and Countervailing Duties: As-

sessment of Antidumping Duties (Assessment II), 68 Fed. Reg. 23,954 (2003).

2. During 1992 and 1993, Commerce conducted an antidumping duty investigation with respect to dynamic random access memory semiconductors (DRAMs) from the Republic of Korea. This investigation resulted in final and amended final determinations that DRAMS produced in Korea were being sold in the United States at less than fair value and Commerce therefore issued an antidumping duty order. See Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea, 58 Fed. Reg. 15,467 (1993); Antidumping Duty Order and Amended Final Determination: Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea, 58 Fed. Reg. 27,520 (1993). The antidumping duty order established cash deposit rates of 4.97% for DRAMS produced by LG Semicon Co., Ltd. (formerly Goldstar Electron Co., Ltd.), 11.16% for DRAMs produced by Hyundai Electronics Co., Ltd., 0.82% for DRAMs produced by Samsung Semiconductor Co., Ltd., and 3.85% for "All others." *Id.* at 27,522.

During the first period of review—October 29, 1992, through April 30, 1994—petitioner, Hitachi High Technologies America, Inc. (formerly Nissei Sangyo America, Ltd.), imported merchandise produced by LG Semicon but purchased through a reseller in Japan. Upon entry, petitioner paid estimated cash deposits at the rate of 4.97%, the estimated duty for merchandise produced by LG Semicon. Pet. App. 3a.

On May 4, 1994, Commerce published a notice of opportunity to request an administrative review with respect to subject merchandise entering the United States